No. 21,020

IN THE

United States Court of Appeals

For the Ninth Circuit

ELISHA EDWARDS,
Appellant,

vs.

PACIFIC FRUIT EXPRESS COMPANY,
Appellee.

Appeal from Summary Judgment by the United States District Court for the Northern District of California

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

The United States District Court granted summary judgment for appellee and against appellant. Appellate jurisdiction of this court, from a final judgment below, rests upon 28 U.S.C.A. §225.

This action arises under the Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C.A. §51 et seq., and more specifically pursuant to appellant's allegation that appellee is "a common carrier by Railroad . . . engaged in interstate commerce between the several states." (Transcript of Record, hereinafter TR, 1.) Appellant's complaint contains the following allegations: appellee was and is a Utah corporation engaged

in interstate commerce as a common carrier by rail within the meaning of the F.E.L.A.; on November 9, 1963, appellant was employed by appellee in furtherance of appellee's railroad operations; because of the careless and negligent maintenance of appliances and premises by appellee, appellant was seriously and permanently injured when he was completely covered with burning gasoline; as a result, appellant is permanently disabled and disfigured, and has claimed general damages in the sum of One Million Dollars ($1,000,000.00) in addition to special damages.

Appellee's answer (TR 4) admits that it was and is a Utah corporation, that appellant was an employee of appellee at the time of the accident, and that it was necessary for appellant to secure an as yet undetermined amount of medical care and services for the injuries which he sustained. By virtue of appellee's sixth affirmative defense (TR 6), appellee essentially admits that appellant was in fact injured while acting in the course and scope of his employment by appellee. See California Labor Code §3201 et seq.

Shortly after answering, appellee filed its motion for summary judgment, alleging that it was immune from liability under the F.E.L.A. by virtue of the application of that Act only to "every common carrier by railroad." Appellant emphatically urges that appellee is within the scope of the Federal Employers' Liability Act.

STATEMENT OF THE FACTS

This appeal deals exclusively with appellee's railroading activities. As a result, and because judgment was entered at a very early stage in the litigation, the facts on appeal are basically limited to those showing the nature of appellee's operations.

Appellee (P.F.E.) is "one of the oldest refrigerator car companies" in the United States, "having been organized in 1907" (TR 71) and now has approximately 3700 employees. (TR 34.) At present, and since the time of its organization, its sole stockholders are Union Pacific Railroad Company (U.P.) and Southern Pacific Company (S.P.). (TR 34.) Appellee owns, controls, uses and services the largest fleet of refrigerated freight cars and trailers in the United States, variously estimated at 20,852 refrigerator cars and 2039 trailers (TR 34), 25,300 refrigerator cars, 2730 mechanical cars and 1000 "Ice-Tempco" cars (TR 70), or over 22,500 refrigerator cars, 425 refrigerator trailers and 200 flat cars (TR 71, 73); in any event, appellee owns and operates approximately thirty percent of the refrigerated railroad cars in the nation. (TR 71.)

The use of refrigeration in the interstate transportation of freight by rail is not a new development. According to a mimeographed publication by appellee, "transportation of perishable foodstuffs and other commodities which require protection against heat and cold were handled *by railroads* even as far back as 100 years ago." (TR 71, italics added.) Roughly one mil-

lion carloads of perishable commodities move in the United States every year, and appellee *"originates and otherwise handles* about 285,000 carloads or approximately 28% of the nation's total". (TR 71, italics added.) Appellee has the capacity *"to handle* all kinds of perishable foodstuffs and other commodities from *and to* every part of the country." (TR 71, italics added.)

Aside from the operations already mentioned, appellee maintains and operates five car shops at which freight cars are built and repaired at various locations in the United States; in addition, appellee has light repair and cleaning stations at a number of places throughout the Western part of the United States. (TR 72.) Appellee operates eleven ice manufacturing plants across the nation but also purchases ice from other commercial concerns. (TR 72.) Deliveries of ice are made on railroad tracks owned by appellee, and repairs are accomplished by moving freight cars over tracks owned by appellee by means of locomotives also owned by appellee. (TR 37.) Since June of 1961, appellee has entered the piggyback rail field by acquiring refrigerated vans for the movement of commodities from shipper to terminal; these vehicles do not themselves operate on rails but are carried by railroad on flat cars owned by appellee and then proceed upon the highways from terminal to destination. (TR 73.)

Appellee specializes in what are termed Car Service Operations. "These . . . consist in large part of car

distribution, the furnishing of commodity protective services as ordered by the shipper, and . . . diversion and passing service." Car distribution is the operation that "involves the provision of cars at proper places at the proper times" in condition to transport perishables. Appellee's diversion operations involve the rerouting of freight cars when the shipper calls appellee to request a change in destination; "passing service" refers to appellee's notification to the shipper of the precise location of each of appellee's cars bearing the particular shipper's commodities. (TR 74.)

Appellee, incidentally, has repaired in its shops railroad cars of other companies. Appellee has also leased refrigerated cars directly to shippers on a monthly basis.[1]

Appellee operates its railroad equipment within the provisions of the Federal Safety Appliance Act, 45 U.S.C.A. §1 et seq., and the necessary maintenance and repairs have been made both at installations of appellee and at those of other railroad corporations.[2] Appellee also "files financial data with the Interstate Commerce Commission" (TR 35), and its contract to provide services to S.P. and U.P. was presented to the I.C.C. for approval in 1942.[3] Appellee is compensated for the rental of its railway cars at rates vary-

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[1]These two details were mentioned by Judge Goodman in *Gaulden v. Southern Pacific Co.*, 78 F.Supp. 651 (N.D. Calif.), aff'd without further opinion, 174 F.2d 1022 (C.A. 9).

[2]*Pacific Fruit Express Co. v. McColgan*, 67 Cal.App.2d 93, 97, 153 P.2d 607.

[3]*Gaulden*, 78 F.Supp. at 654.

ing from 4.5 to 5.25 cents per mile. (TR 35.) Appellee had net operating income, after deduction of operating and tax expenses, of $17,700,005 in 1958 and $18,770,-426 in 1959.[4]

The Record contains additional data regarding appellee's operations. In general, appellee claims to be America's *"first family of perishable transportation"* and advises the shipping public to call appellee at its offices in principal cities *"for the finest in perishable transportation service throughout America."* (TR 70.)

Appellant was injured on November 9, 1963, at appellee's depot in Roseville, California, while employed by appellee. He was operating a motor vehicle owned and maintained by appellee, and because of misfunction by the vehicle appellant was thrown to the ground and his body covered with burning gasoline. (TR 2.) Appellant was, at the time of the accident, engaged in his normal employment for appellee which involved making appellee's freight cars ready for the transportation of perishable commodities. (TR 37.) Appellant has alleged that his injuries were caused by the carelessness and negligence of appellee in the maintenance and operation of its appliances, machines and other equipment, and in its failure to provide appellant with a safe place in which to work.

Summary judgment was granted against appellant in the District Court solely upon the issue of the applicability of the F.E.L.A. to appellee.

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[4]Report of the Commission, 318 I.C.C. 132 (re: contracts for protective services).

STATEMENT OF THE ISSUE

The sole issue in this appeal is the responsibility of appellee for personal injuries under the terms of the Federal Employers' Liability Act, 45 U.S.C.A. §51 et seq., whereby liability attaches to "every common carrier by railroad" in interstate commerce for negligence in the maintenance or operation of "its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

SUMMARY OF ARGUMENT

1. Appellee's business activities are plainly those of a railroad corporation even though its operations may differ in some particulars from those of certain other corporations which are also railroads. The specific facts regarding the details of appellee's facilities and services have never before been presented fully to any court for adjudication, and any prior analysis of appellee's operations is marred by lack of current information.

2. The so-called "express company" cases are inapposite. Appellee must be tested by judicial precedent relating to operations similar to appellee's.

3. The United States Supreme Court has recently provided a modern guide in the construction of the F.E.L.A., and appellee is a railroad corporation under that test. A brief consideration of parallel State legislation also indicates that appellee must be included under the Federal Employers' Liability Act as a common carrier by rail engaged in interstate commerce.

ARGUMENT

I. INTRODUCTION

This appeal deals solely with a close scrutinization of appellee's operations. Appellant recognizes that such a discussion must include reference to the other instances where suit has been brought against appellee under the F.E.L.A. (*Gaulden v. Southern Pacific Company,* 78 F.Supp. 651; *Moleton v. Union Pacific,* Utah, 219 P.2d 1080; *Aguirre v. Southern Pacific,* 232 Cal.App.2d 636, 43 Cal.Rptr. 73.[5]) In contrast to other litigation involving appellee, however, appellant herein has not joined either of appellee's owners in this action. Nor has appellant attempted to impute the operations of appellee's owners to appellee itself. Because there has not been a single reported case involving a personal injury action against P.F.E. which did not also include one or both of its owners as parties defendant, every such prior F.E.L.A. action has suffered from the infusion of questions of agency, contract, employment or joint enterprise.[6] These analyses share a common weakness: they are prone to engage in a search for *the* railroad—as between appellee or its owners—as if there were some convincing force in the bare fact that appellee commonly works

[5]*Moleton* and *Aguirre* both rest upon *Gaulden* and the cases cited therein. The court in *Aguirre* notes that the facts in all three cases are substantially the same. 232 Cal.App.2d at 645 and 649. Accordingly, the following discussion deals with *Gaulden* only but should be read as applying equally to the other cases.

[6]In *Aguirre,* where both S.P. and U.P. were also defendants, the appellant's briefs dealt in great part with the California statutory times and procedures relating to notice and sufficiency of motions for summary judgment. Appellant's Briefs, 3 Civil No. 10901 (1964).

with railroad companies. In fact, it is not reasonable to contrast appellee's operations solely against a rather limited and archaic concept of railroading; justice compels that the impact of modern authorities be gauged as it bears upon appellee and the F.E.L.A.

This appeal will concentrate upon the actual business of P.F.E. as shown by the Record herein and by other documents of public record. When viewed objectively and apart from its parent corporations, appellee emerges as a common carrier. P.F.E. is the largest owner of refrigerated rail cars in the nation. (TR 71.) It owns tracks, terminal facilities and nationwide servicing, refrigeration, repair and routing installations. (TR 72, 74.) Appellee provides a service inextricably connected with the transportation of perishable freight by railroads since well before the passage of modern railway legislation; however, P.F.E. was not in operation until after the F.E.L.A. was first enacted in 1906. (TR 71.) The services rendered by appellee are of value only to shippers and consumers of perishable commodities and are used only in the actual transportation of such goods. The business of appellee is to "originate and otherwise handle" approximately twenty-eight percent of the rail transportation of refrigerated goods in this country. (TR 71.) Except for the operation of a limited number of highway trailers, appellee confines its operations to dealing with movement of goods by rail.

II. THE FACTS OF THIS CASE ARE BEFORE THE COURT FOR THE FIRST TIME

There are two compelling reasons why *Gaulden v. Southern Pacific Company,* 78 F.Supp. 651, does not control or even bear upon this appeal. First of all, different questions were before the Court in *Gaulden.* Secondly, the nature of appellee's business is now different, and it was not even presented fully to the District Court in 1948.

Appellant herein contends simply that appellee must itself be identified as a common carrier by railroad. In contrast, plaintiff in *Gaulden* based his suit upon the grounds that P.F.E. was the agent of S.P., that S.P. and P.F.E. were engaged in a joint enterprise—making plaintiff an employee of S.P., that the contract between S.P. and P.F.E. violated Section 5 of the F.E.L.A. as an attempt to evade liability by device, and that the 1939 amendment to the Federal Employers' Liability Act "being remedial and humanitarian in purpose, the courts should construe the intent of Congress to include the appellee . . . as a 'Common Carrier by Railroad. . . ."[7] Brief for Appel-

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[7]The entirety of appellant Gaulden's argument on the last issue consisted of the following:

> Congress by the 1939 amendment to the Federal Employers' Liability Act liberalized and broadened the scope of the Act as to what constitutes interstate commerce and it is respectfully submitted that the Act being remedial and humanitarian in nature the Courts should construe liberally the phrase "common carrier by railroad" so as to include refrigeration car service. (Brief for Appellant, 18.)

The single brief submitted for both appellees therein, although discussing this issue by citing substantially the same authorities contained in appellee's Memorandum of Points and Authorities herein (TR 12-18), places its greatest emphasis upon the relation-

lant, 7-8, 2555 Records of the U.S. Circuit Court of Appeals, Number 12062. The District Court's treatment of this last argument was confined to a comment that these "remedial and humanitarian purposes . . . in no way compel an interpretation of the *contract* in favor of an *employment or agency relationship*" between S.P. and P.F.E. (Italics added.) The treatment of the question of appellee's railroad operations was only secondary and incidental to the "more substantial contention urged by plaintiff" that the contract between appellee and S.P. created an agency relationship.[8]

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ship between P.F.E. and S.P. while mentioning only those operations of P.F.E. which are ancillary to the transportation of freight.

Unfortunately, rather than submitting appropriate legal and factual authority bearing upon this issue, appellant Gaulden's Reply Brief specifically excludes the issue of "whether an employee of a refrigerator car company is *per se* an employee of a common carrier by railroad" and instead asserts that P.F.E. was but "the agent of . . . Southern Pacific Company, and not an independent contractor." (Reply Brief, 1-2.)

[8]78 F.Supp. at 654, 656-57. Appellant herein agrees generally with the general position of plaintiff in *Gaulden* and takes issue with many of the conclusions reached by the District Court therein regarding the nature of appellee's operations. That decision appears to rest upon a close scrutiny of commercial relationships rather than upon a consideration of the truly "remedial and humanitarian" nature of all of the legislation in Title 45, U.S.C., for the protection of persons employed in interstate transportation by railroad.

Appellant herein believes that the 1939 amendments to the F.E.L.A. were not intended necessarily to make that Act more humanitarian but rather to reiterate the desire of Congress to exercise plenary remedial powers in interstate commerce after the clarification of its Commerce Clause powers by the United States Supreme Court. For a discussion of the latter decisions, see appellant's Memorandum of Points and Authorities below. (TR 42.) The primary effect of the amendments was to restore the scope of the application of F.E.L.A. to that intended by the framers in 1906.

It is plain that the questions presented for decision in *Gaulden* were removed from any interpretation of the F.E.L.A. by the intervention of contract and agency issues. This is further borne out by the Transcript of Record therein considered as a whole, especially plaintiff's complaint (*Gaulden* TR 2-7) and additional interrogatories (*Gaulden* TR 18-19) which were directed almost exclusively to the intricate connection between S.P. and P.F.E. Manifestly the former corporation provides primarily locomotion while the latter provides essentials such as freight cars, ice, supervision of operations and the like, without which the locomotion furnished by S.P. would be insignificant in interstate commerce. But the question in this appeal is not quantitative; instead, this is a purely qualitative question and must rest exclusively upon an analysis of appellee's railroad operations alone.

Gaulden in reality can stand only for the proposition that the *contract* between S.P. and appellee did not expose appellee's owners to F.E.L.A. liability for injuries to appellee's employees on the basis of agency, joint enterprise or fraud. Insofar as that decision might purport to go farther, it cannot be viewed as reliable authority since neither sufficient facts nor proper legal authorities were before the courts at that time. The facts presently before this Court are different in many crucial respects from those recited in the *Gaulden* opinion notwithstanding the fact that the same appellee is involved. Some of the details recited in *Gaulden* must also be seen as

taking on additional significance when read in conjunction with the Transcripts of Record herein and in *Gaulden*.

As of May, 1965, appellee's publications available to the public[9] indicated ownership by appellee of twenty-five thousand three hundred refrigerator cars, 2730 mechanical cars, and 1000 "Ice-Tempco" cars, making appellee the "nation's largest operator of refrigerated rail cars."[10] Readers of this publication are further advised that

> TEMPCO-VANS, the most modern trailers designed especially for combination highway and piggyback operation, are the latest addition to PFE's *first family of perishable transportation.* . . . Shippers and consignees want their shipments

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[9]See Declaration of Leland P. Jarnigan. (TR 69.) The materials attached thereto and made a part of the Record (Tr. 70-76) are informally obtained advertising literature but would nonetheless be admissible against appellee upon trial of this action. F.R.C.P. 43(a); California Code of Civil Procedure, Section 1870(2); see also California Evidence Code, Sections 1220-1222, effective January 1, 1967. As such, and because they have been included without objection in the Record, they must be considered in this appeal as containing statements which can properly be used against appellee.

The mimeographed narrative describing appellee's operations bears the notation "Office of Vice President & General Manager/San Francisco, California/March 1, 1963" (TR 75) and incorporates certain photographs (TR 76), although it is not otherwise apparent when these documents were prepared.

[10]The same publication also refers to "TEMPCO-VAN SERVICE" involving P.F.E.'s ownership of 400 refrigerated highway trailer-containers and 200 Piggyback rail flat cars. (TR 70.)

"Ice-Tempco" refers to the presence in the freight cars of "units for constant operation of air-circulating fans while under load to produce controlled temperatures." (TR 73.) This further shows that appellee is closely concerned with the actual transportation of goods and has not completed its services with the mere loading of ice into a boxcar.

> transported speedily and smoothly *and delivered to the market in top condition.* . . . A refrigerated trailer must do more than just transport and refrigerate. . . . (TR 70-71.)[11]

It is clear that appellee holds itself out to the public as providing transportation and delivery of freight and that P.F.E. in fact is concerned with far more than providing a private service to other railroads. To serve the shipping public directly, appellee possesses "offices and agencies in all principal Western producing areas" and in "all major receiving and consuming areas." Appellee gives "complete diversion and passing advice service" and employs "specialized personnel to serve the perishable shipping and receiving trade." (TR 70.) A random sampling reveals that P.F.E. is listed in the 1966 classified telephone directories of San Francisco, California (page 761), and Omaha, Nebraska (page 333), under the heading "Railroad Companies", and of Chicago, Illinois (page 1650), under the heading "Railroads".

It would be grossly incorrect to view appellee's business as a static enterprise limited to putting ice into freight cars and repairing the cars which it owns. Yet this is the posture which appellee has taken when-

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[11]The italics have not been added but, strangely, appear in the publication as provided by appellee, thereby emphasizing P.F.E.'s actual involvement in the interstate transportation of freight.

The mimeographed narrative also indicates that "in June, 1961, P.F.E. acquired several million dollars worth of refrigerator trailers for use in the piggyback rail field." (TR 73.) This therefore represents a change in appellee's operations since *Gaulden,* although the affidavit submitted herein by appellee does not discuss this aspect of its operations in any detail. (TR 34-38.)

ever the F.E.L.A. looms large. It was perhaps for this reason that the *Gaulden* opinion describes appellee in the following terms:

> The shippers specify to the carrier, in writing, the type of service desired; they may, by written order, change the type of service originally requested. . . . The shipper's orders are transmitted by the carrier to the Pacific Fruit Express Company . . . [which] transacts none of its protective service business directly with the shippers. 78 F. Supp. at 654.

A different picture entirely is seen in appellee's own description of its business in 1963, the same year in which appellant sustained his injuries:

> . . . it is now possible safely to handle all kinds of perishable foodstuffs and other commodities from and to every part of the country. About 1,000,000 carloads of such commodities move in the United States in the course of a year, and this Company originates and otherwise handles around 285,000 carloads or approximately 28% of the nation's total. . . . (TR 71.)
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> . . . close to 1,300,000 tons [of ice] annually . . . is issued to the ice compartments in the ice bunker cars as they travel toward their destination with their precious ladings of fruit, vegetables and other foodstuffs and miscellaneous perishable commodities. (TR 72.)
>
> [The refrigerator trailers and cars] are used for frozen foods as well as fresh fruits and vegetables and add to the many other features of PFE service the convenience of pick-up and delivery. (TR 73-74.)

> These latter [car service] operations consist in large part of car distribution, the furnishing of commodity protective services as ordered by the shipper, and what is referred to in railroad terminology as diversion and passing service.
>
> . . . car distribution is an operation that involves the provision of cars at proper places at the proper times and in condition that will permit the safe transport of products to points of use. (TR 74.)
>
> . . . if after valuable produce is loaded into a car and it is started on its way to the consuming center, . . . it is learned that another area has better demand and offers a better price, the shipper will call us on the telephone and request that we "divert" the car from its originally billed destination to the new destination. . . . In handling some 285,000 carloads of perishables a year we are called upon by shippers to accomplish in the neighborhood of 170,000 diversions a year. . . . We have sizable diversion forces at Chicago . . . [which] are aware at all times where each and every loaded car may be and we keep shippers informed when their shipments "pass" certain points, and this is what we mean when we speak of "passing service." (TR 74-75.)

All of the rolling stock illustrated clearly bears appellee's name, while the insignia of appellee's owners appear in subordinate detail. Most significantly, the public is exhorted to contact appellee directly "for the finest in perishable transportation service throughout America" since appellee, in addition to S.P. and U.P., maintains "offices in principal

cities to supply your needs fast—wherever you are." (TR 70.)

Thus the shipper specifies to appellee, apparently either in writing or by telephone, the type of service desired. The shipper may also change the type of service originally requested in the same manner. The shipper may obtain from appellee the location of each car carrying perishables and may reroute any of its cars simply by calling appellee. Appellee originates, supervises and actually controls the movement of goods throughout the United States. It cannot now insist that it does not deal directly with the shipping public. P.F.E. is in fact intimately connected with the carriage of perishable freight by rail and does not engage in a single major non-railway operation.

The affirmative details regarding appellee's operations as set forth in *Gaulden* should not be ignored. Appellee does indeed furnish "reefers" to other railroads, rents some directly to shippers, heats and cools freight cars, owns tracks and terminals, repairs and services freight cars, and owns locomotives. From appellee's affidavit herein (TR 37) it also appears that appellee moves railroad cars with its own locomotives as needed "for the furnishing of protective services."

Within any reasonable construction of the phrase, appellee plainly "controls the movement of 'reefers' . . . beyond its icing docks and plants", and the statement to the contrary in *Gaulden* is clearly erroneous. 78 F.Supp. at 653. Regardless of the source of the factual weakness of *Gaulden*—whether due to the lim-

ited and slanted description by the appellees of their operations, or to the failure of appellant therein to pursue an inquiry into the true nature of appellee's activities, or even to the recent expansion of appellee's operations during the past twenty years—that opinion does not represent a fair or thorough evaluation of P.F.E. and is not determinative of appellee's status under Federal legislation. The true nature of appellee's operations is now clear and requires that appellee be held accountable under the F.E.L.A. for negligence regarding its cars, appliances, machinery or other equipment.

III. OPERATIONS SIMILAR TO APPELLEE'S HAVE ALREADY BEEN CLASSIFIED AS COMMON CARRIERS BY RAILROAD

The *Gaulden* opinion and appellee's Motion for Summary Judgment rested upon *Wells Fargo v. Taylor,* 254 U.S. 175 (1920), an archaic and devitalized decision in the realm of F.E.L.A. litigation.[12] That decision upheld the validity of an employment contract exonerating an express company from liability for personal injuries in spite of explicit Congressional direction to the contrary.[13] To accomplish this, the

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[12]Appellant has included in the Transcript of Record all of the documents submitted in opposition to the Motion for Summary Judgment. Appellant's Memorandum (TR 40 et seq.) devotes substantial attention to *Wells Fargo,* and the argument will be abbreviated herein. Reference should be had to the Memorandum for further discussion on all of the legal issues involved herein.

[13]The House Committee on the Judiciary, in referring out the F.E.L.A. in 1908 as a bill relating "to common carriers by railroad" intended "in its scope to cover all commerce to which the

court deliberately placed the narrowest—and most circular—construction possible upon the words "common carrier by railroad": "one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier."[14] None of the language of *Wells Fargo* is in the least inconsistent with inclusion of appellee under the Federal Employers' Liability Act. Fundamentally, Wells Fargo did not own the appliances or engage in the business of railroading.

Congress in 1906, in amending one of the nation's most comprehensive legislative programs, provided a practical definition of applicable language in the Interstate Commerce Act. 49 U.S.C.A. §1 et seq. The I.C.A. applies, *inter alia,* to "any common carrier . . . engaged in the transportation of passengers or property wholly by railroad . . . ." and includes all instrumentalities used in the transportation of persons or goods by rail within the term "railroad." "Transportation" as

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regulative power of Congress extends", expressed the specific intention to render void "any contract or rule whereby a common carrier seeks to exempt itself from liability created by this act." 45 U.S.C.A. §55. Specific reference was made to the fact that

> . . . employees of many of the common carriers of the country are to-day working under a contract of employment which by its terms releases the company from liability for damages arising out of the negligence of other employees. As an illustration we quote one paragraph from a blank form of application for a situation with the American Express Company . . . .

A copy of this Report is included in the Record herein. (TR 50-54.)

[14]The court later made reference to "cars, engines, track, roadbed and other property pertaining to a going railroad" (an incomplete reference to the language of 45 U.S.C.A. §51) and also referred to the language of the Safety Appliance Act, 45 U.S.C.A §§3 and 4, "requiring engines and cars to be equipped with" certain safety equipment.

used in the I.C.A. specifically includes "refrigeration or icing".[15] Although the F.E.L.A. *per se* does not define its terms, it uses references to railroad equipment which are strikingly similar to the I.C.A. language. Furthermore, the close relationship between Title 49 and Title 45 is illustrated by the fact that the Railway Labor Act, 45 U.S.C.A. §151 et seq., specifically adopts the same definition of common carrier as in the Interstate Commerce Act. With only minor variation in specific words, the same broad concept of common carrier, transportation and railroad appears in every Act in Titles 45 and 49 defining or explaining those terms. Cf. Railroad Retirement Act, 45 U.S.C.A. §228, and the Railroad Unemployment Insurance Act, 45 U.S.C.A. §351, for examples.

The Federal Safety Appliance Act, 45 U.S.C.A. §1 et seq., is the link between the Interstate Commerce Act and the Federal Employers' Liability Act. The Safety Appliance Act has been held to be at least as broad in its application as the I.C.A. but is not limited by any requirements of the latter regarding "a continuous carriage or shipment." *Pacific Coast Ry. Co. v. United States,* 173 Fed. 448 (C.C.A. 9). The safety appliance statutes are basically *in pari materia* with the F.E.L.A., may be seen as amend-

[15]The Interstate Commerce Act is relevant to this discussion if for no other reason than the fact that the Court in *Wells Fargo* singled out the "similar words in the original" Act which had been construed "as including carriers operating railroads but not express companies doing business as here shown." 254 U.S. at 187. This ignored the explicit Congressional action of 1906 adding express companies to the paragraph defining railroad terms. 34 Stats. 584.

ments thereto, and definitely serve to expand the rights and protection given to persons employed in interstate commerce. *Urie v. Thompson,* 337 U.S. 163 (1949). In fact 45 U.S.C.A. §23 (Boiler Inspection Act) gives the I.C.C. rule-making power to protect employees in railway operations. *Urie,* 337 U.S. at 193. It is axiomatic that when Congress acts it legislates to the full extent of its Constitutional authority unless it specifically elects otherwise. This is especially true in legislation under the Commerce Clause of the Constitution. (See TR 42-43 for discussion of Commerce Clause cases.) In the absence of direct and specific indications to the contrary, it must reasonably be concluded that Congress has intended in its railroad legislation to utilize its plenary power to protect and nourish interstate commerce "no matter what the source of the dangers which threaten it." *Mondou v. New York, N.H.&H.R. Co.,* 223 U.S. 1, 51 (1912), the second F.E.L.A. cases; see generally *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937).

Express companies such as Wells Fargo have subsequently been recognized and classified as common carriers, and any exclusion of the application of the F.E.L.A. arises from their lack of railroad appliances and facilities rather than from any shortage of transportation activities in interstate commerce. *Fleming v. Railway Express Agency,* 161 F.2d 659 (C.C.A. 7); *Jones v. New York Central,* 182 F.2d 326 (C.A. 6). Express companies are usually engaged in the business of short-distance movement of freight, including

delivery to and receipt of goods from other carriers. But their operations do not customarily involve owning, servicing or operating railroad equipment *per se.* See *Pacific Express Co. v. Seibert,* 44 Fed. 310 (W.D. Mo.); *Alsop v. Southern Express Co.,* 104 N.C. 278, 10 S.E. 297, 6 L.R.A. 271; *Pfister v. Central Pacific Ry. Co.,* 70 Cal. 169, 11 Pac. 686, 59 Am.Rep. 404. Even with the limited nature of express company operations, the court in *Fleming, supra,* has no hesitation in holding that

> a common carrier is one who, for hire, engages in transporting commodities from one place to another, or in connection with another carrier, such as a railroad. It does not step outside its common carrier status because it only renders part, though a necessary part, of a transportation service, or because it renders its service as an agent of a common carrier. 161 F.2d at 661.

The *Fleming* decision included express companies as common carriers under the rationale of the terminal company cases, *infra.*

A terminal company ordinarily prepares, services, supervises and occasionally operates railroad equipment between journeys and does not usually act upon the equipment while actually crossing State lines.[16] See *Fort Street Union Depot Company v. Hillen,* 119 F.2d 307 (C.C.A. 6); *McCullough v. Jacksonville Terminal Co.,* Fla.App., 176 So.2d 345. Because of the interrelation between terminal companies and rail-

[16]See appellant's Memorandum (TR 45-49) for further discussion of the terminal company cases.

roads in interstate commerce, the terminal operations have been included within requirements of the Interstate Commerce Act, *Union Stockyard v. United States,* 308 U.S. 213 (1939); the Hours of Service Act, *United States v. Brooklyn Eastern District Terminal Co.,* 249 U.S. 296 (1919), *Bush v. Brooklyn Eastern District Terminal Co.,* 218 N.Y.S. 516, 218 App.Div. 782; the Federal Safety Appliance Act, *McCullough v. Jacksonville Terminal Co., supra,* 176 So.2d 345; and, most importantly, the Federal Employers' Liability Act, *Fort Street Union Depot Company v. Hillen, supra,* 119 F.2d 307; *McCabe v. Boston Terminal Co.,* 303 Mass. 450, 22 N.E.2d 33. These terminal companies generally owned no railroad cars and rendered no services directly to the public. Yet their activities have been sufficiently related to railroading to classify these companies as common carriers engaged in railroad operations.

Appellee is certainly more a common carrier by railroad than is a terminal company. Aside from rendering services, P.F.E. owns cars, two engines, tracks, plants and facilities, and moreover holds itself out to the public as providing "the finest in perishable transportation service throughout America." (TR 70.) Even if appellee acts in part through others, that does not alter the determination that P.F.E. is a common carrier by railroad. *Eddings v. Collins Pine Company,* 140 F.Supp. 622 (N.D.Calif.), holding that a lumber company substantially "operated" a railroad, even though it did not in fact own any of the equipment, and was therefore liable under the F.E.L.A.

IV. APPELLEE IS A COMMON CARRIER BY RAILROAD UNDER APPLICABLE MODERN GUIDELINES

Perhaps the clearest method of demonstrating appellee's status as a common carrier by railroad is to examine its operations in terms of the language of the United States Supreme Court in *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, 185 (1964):

> Consisting of about 50 miles of railroad tracks in the area adjacent to the State Docks at Mobile, it serves those docks and several industries situated in the vicinity, and also operates an interchange railroad with several privately owned railroad companies. It performs services for profit . . . . It conducts substantial operations in interstate commerce. It has contracts and working agreements with the various railroad brotherhoods . . . ; maintains its equipment in conformity with the Federal Safety Appliance Act . . . ; and complies with the reporting and bookkeeping requirements of the Interstate Commerce Commission. It is thus indisputably a common carrier by railroad engaging in interstate commerce.

A company is therefore subject to the F.E.L.A. if it (1) owns tracks, (2) provides services to other commerce located near its facilities, (3) operates in conjunction with other railroads, (4) performs its services for profit, (5) acts in interstate commerce, (6) has contracts with railroad brotherhoods, (7) complies with the safety appliance acts and regulations, and (8) handles its bookkeeping pursuant to the regulations of the I.C.C. Appellee falls within every one of the enumerated standards of the *Parden* decision.

P.F.E. owns tracks, as well as engines, terminals and the largest fleet of refrigerated freight cars in the United States. See, for example, TR 37, 71.

Appellee, as discussed earlier, devotes its entire operation to direct and indirect services to shippers of perishable commodities, moves railroad cars for icing operations, directs the movement of cars in transit and provides complete service for the pick-up, movement and delivery of perishables.

"PFE has formal written contracts to render protective services to a number of railroads". (TR 32.) The Record reflects the fact that these services are rendered on a nation-wide basis. Moreover, as has been indicated earlier, appellee deals directly with both shippers and railroads in the rerouting of perishable freight while it is in transit. The lack of substantial locomotive power cannot be considered an essential shortcoming in view of the terminal company cases; nor is it significant that appellee does not connect other rail lines since it is quite conceivable that a railroad could operate exclusively upon its own tracks.

Appellee is compensated for its services and is presumably intended to be a profit making corporation. (TR 35-36.)

Appellee unquestionably acts in and on interstate commerce and has apparently never denied that aspect of its activities.

The affidavit filed by appellee in *Gaulden* stated that most, if not all, nonmanagerial employees of P.F.E. "belonged to labor unions (sometimes referred

to as Brotherhoods) and P.F.E. had collective bargaining agreements with said unions. . .".[17] 2555 Records of the U.S. Court of Appeals, Number 12062, TR 34.

Appellee's freight cars have been found to receive "those repairs necessary to meet requirements of the federal safety appliance acts and regulations thereunder and to keep cars in suitable condition for efficient and satisfactory operation. . . ." *Pacific Fruit Express Co. v. McColgan,* 67 Cal.App.2d 93, 97, 153 P.2d 607. This comes as no surprise since the Safety Appliance Act, 45 U.S.C.A. §1 et seq., was amended in 1903 to embrace "all trains, locomotives, tenders, cars" and like equipment "used on any railway engaged in interstate commerce" and to the other facilities and equipment "used in connection therewith." 32 Stat. 943.

Appellee is subject to the reporting and bookkeeping requirements of the Interstate Commerce Commission as shown by the statement in appellee's affidavit herein that it "files financial data" with the Commission, and the I.C.C. can require such data and can prescribe the form of accounts used by P.F.E. (TR 35.) Appellee's contract with U.P. and S.P. was filed with the I.C.C. for approval in 1942. *Gaulden, supra,* 78 F.Supp. at 654. It also appears that the I.C.C. has additional authority to conduct hearings regarding the

[17]Although not in the Record, appellee still deals with a railroad clerical brotherhood of which appellant was a member at the time of the accident. If the court deems it necessary, the Record herein can be augmented to add evidence of these facts.

type of service furnished by P.F.E. and other such companies. See Report of the Commission, 318 I.C.C. 111, 120-121.

CONCLUSION

Both the terminal company cases and current reasoning under the F.E.L.A. require that appellee be included with that Act. There can be no doubt that appellee is a common carrier. Equally surely, appellee operates almost exclusively by railroad, to a greater extent than the terminal companies. Lastly, P.F.E. is undeniably engaged in interstate commerce.

Appellee cannot be heard to claim that it is exempt from the federal legislation involved herein. If appellee were so exempt and immune, then *a fortiori* it would come within the scope of parallel State legislation. A brief glimpse at applicable California statutes, however, shows clearly that this State would consider appellee as subject to federal railway acts.

California Public Utilities Code §229 includes all tracks, depots, yards, grounds, terminals and terminal facilities, and all other equipment used in rail transportation within the term "railroad". Public Utilities Code §230 defines a "railroad corporation" as every corporation which owns, controls, operates or manages any railroad in this State. Moreover, every such railroad corporation in California is a "common carrier" as defined by statute. California Public Utilities Code

§211. By definition, appellee is also a "public utility" in California. Public Utilities Code §216(c).[18]

Appellee "does not report to the California Public Utilities Commission, nor to any other state utilities commission." (TR 35.) The California Public Utilities Act is made explicitly inapplicable to interstate commerce operations. Public Utilities Code §202. This explains why appellee, a public utility and railroad corporation by California standards, is exempted from State control. However, such exemption must reasonably mean that appellee has the correlative responsibilities under Federal legislation.

Substance, not form, must determine which statutes apply to P.F.E. As expected, appellee minimizes its direct activities in the carriage of goods. It must be borne in mind, however, that on a Motion for Summary Judgment the moving party is not entitled to draw favorable inferences from his moving papers. *Cochran v. United States,* 123 F.Supp. 362 (D.C. Conn.) The matters presented in connection with the motion must be construed most favorably to appellant herein. *United States v. Diebold, Inc.,* 369 U.S. 654 (1962). The Record as a whole clearly established the fact that appellee's operations are much more extensive than assumed previously. This being the case, appellee should no longer be allowed to retreat behind its contract with S.P. and U.P. In *Gaulden* and the

[18]For examples of similar State legislation in the Ninth Circuit, see Arizona Constitution, Art. 15, §10; Idaho Code Annotated, §61-113, §61-107; Montana Revised Code Annotated §§72:114, 72:115; Nevada Revised Statutes §704.020; Oregon Revised Statutes §760:010.

succeeding cases, P.F.E. was an employment shield between an injured worker and S.P. or U.P. It must not now be allowed to assert that its operations are performed by other railroads.

Appellant respectfully submits that the District Court erred in granting judgment for appellee and urges that this matter be remanded for trial upon the merits.

Dated, San Francisco, California,
November 28, 1966.

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Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ARNE WERCHICK,
Attorney for Appellant.